Supreme Court, U.S.
FILED
AUG 18 2006
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No. 06- 06-250

In The

Supreme Court of the United States

OPERATORS AND CONSULTING SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DANOS & CUROLE MARINE CONTRACTORS, INC., THE GRAY INSURANCE COMPANY, AND JAMES MORRISON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI OF OPERATORS AND CONSULTING SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit and the Benefits Review Board erred by failing to properly apply established precedent of the Fifth Circuit and at least two other Circuit Courts under the Longshore and Harbor Workers' Compensation Act, holding that where an employee experiences an aggravation or exacerbation of a pre-existing injury, however minor, while working for a subsequent maritime employer, and that employee's condition ultimately results in a disability while working for the subsequent maritime employer, the subsequent maritime employer shall be responsible for all benefits owed to the employee, thereby creating a conflict among the Circuit Courts?

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellants in the Court of Appeals and the Petitioners herein are Operators and Consulting Services, Inc. and Zurich American Insurance Company. The named appellees in the Court of Appeals and the Respondents herein are Danos & Curole Marine Contractors, Inc., The Gray Insurance Company, James Morrison, and the Director, Office of Workers' Compensation Programs, United States Department of Labor. Operators and Consulting Services, Inc. does not have any parent companies. Zurich American Insurance Company is a wholly owned subsidiary of Zurich American Insurance Group.

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CONCISE STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision in this appeal on March 31, 2006. Thereafter, petitioners filed a timely Petition for Rehearing En Banc on May 8, 2006.[1] The Fifth Circuit denied petitioners' Petition for Rehearing En Banc on May 22, 2006.

This Honorable Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

1. Longshore and Harbor Workers' Compensation Act – Section 902(10)

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean

[1] The United States Department of Labor is a party to this appeal. Therefore, pursuant to Federal Rule of Appellate Procedure 40(a), petitioners had 45 days in which to file their Petition for Rehearing En Banc.

> permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

33 U.S.C. §902(10).

CONCISE STATEMENT OF THE CASE

James Morrison (hereinafter "Morrison") filed a claim for compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §901, *et seq.*, against Operators and Consulting Services, Inc. (hereinafter "OCS," "Petitioner") and Zurich American Insurance Company (hereinafter "Zurich," "Petitioner") and, thereafter, Danos & Curole Marine Contractors, Inc. (hereinafter "Danos & Curole," "Respondent") and The Gray Insurance Company (hereinafter "Gray," "Respondent"). The issues raised could not be resolved administratively, and a formal hearing was held before an Administrative Law Judge (hereinafter "ALJ") on January 23, 2003.

In his Decision and Order, the ALJ held that OCS and Zurich were the responsible employer and carrier, respectively, and that Danos & Curole and Gray were not liable for Morrison's disability and benefits.

OCS and Zurich filed a Notice of Appeal of the Decision and Order with the Benefits Review Board (hereinafter "BRB"). The BRB affirmed the ALJ's Decision and Order, without modification. (*See* Appendix at App. 14).

OCS and Zurich filed a Petition for Review in the United States Court of Appeals for the Fifth Circuit. A panel issued its decision on May 12, 2005 (*see* Appendix at App. 23), after which Petitioners filed a Petition for Rehearing En Banc. Thereafter, the panel *sua sponte* withdrew its decision, and oral argument was granted, rendering the Petition for Rehearing En Banc moot. (*See* Appendix at App. 30). The subsequent panel's decision was issued on March 31, 2006, affirming the lower courts' decisions. (*See* Appendix at App. 1). Thereafter, a Petition for Rehearing En Banc was filed and the subsequent panel denied the Petition. (*See* Appendix at App. 31).

ARGUMENT

A. Statement of Facts

Morrison was hired by OCS as a field mechanic. His job was "heavy," requiring strenuous physical labor. Between October 16, 1997, the date of the original accident, and May 1998, when he was hired by Danos & Curole, Morrison's ***functional capacity*** did not deteriorate. He performed the same job, requiring the same physical demands. Morrison did not miss any work with OCS. He first became disabled in September 1998, after working approximately five months for Danos & Curole.

Danos & Curole confirmed that there was absolutely no difference between Morrison's job with OCS and his job with Danos & Curole, in which he worked for approximately ***five months*** before going on disability. Morrison passed all phases of the hiring process, and was offered the ***exact same job*** he held with OCS at the ***same*** work location.

The Fifth Circuit readily acknowledged that both Dr. Gramlich (treating chiropractor) and Dr. Wilson (treating neurosurgeon) admitted that Morrison's employment with ***Danos & Curole*** could have exacerbated Morrison's back. Significantly, Morrison treated with Dr. Wilson only ***after*** working for Danos & Curole for approximately five months. Dr. Wilson testified based on a reasonable degree of medical probability that Morrison would not have needed surgery had he stopped working in his heavy job when his employer changed from OCS to Danos & Curole.

B. The Fifth Circuit's Decision Runs Contrary to the Well-Established Last Responsible Employer Rule

This Court reviews the lower courts' decisions for errors of law and adherence to the substantial evidence standard. The BRB's interpretation of the LHWCA is a question of law that is reviewed *de novo*. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir. 2003).

The simple issue presented in this LHWCA claim is whether Morrison's five-month employment with Danos & Curole aggravated, accelerated, exacerbated, contributed to, or combined with his original injury incurred with OCS. The issue ***is not*** whether Morrison experienced a "traumatic event" while working for Danos & Curole, as suggested by the Fifth Circuit.

The Fifth Circuit perpetuated the error committed by both the ALJ and the BRB by citing, and then seemingly ignoring, the express testimony of the health care providers. The health care providers conceded that Morrison's work with Danos & Curole exacerbated his lumbar back

condition. More importantly, the Fifth Circuit failed to distinguish this claim from the several prior cases cited by Petitioners presenting the ***exact same*** facts as involved herein.

The evaluation begins with the definition of "injury" under the LHWCA. Morrison must have sustained some harm or pain caused by conditions at work, or an accident occurred that could have caused the harm or pain. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). An injury occurs when something unexpectedly goes wrong within the human frame. *Johnson v. Brady-Hamilton Stevedore Co.*, 11 BRBS 427, 430 (1979).

An injury may be the ***aggravation***, ***exacerbation***, or ***acceleration*** of a pre-existing condition, in which case ***the employer at the time of the aggravation, exacerbation, or acceleration*** is liable for the full extent of the resultant disability. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201, 205 (1980).

If a second injury (*e.g.*, pain caused by conditions at work) ***aggravates, accelerates, exacerbates, contributes to***, or ***combines with*** the employee's first injury to cause greater disability, the second injury is compensable and the last employer is responsible for the entire disability. *Employers National Ins. Co. v. Equitable Shipyards*, 640 F.2d 383 (5th Cir. 1981), *aff'g, Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). Nowhere in the above definitions is a "traumatic event" required – all that is required is some harm or pain caused by conditions at work.

The "Aggravation Rule" (also referred to as the "last employer rule") applies to injuries which are not caused by

identifiable incidents, but which are ***gradually produced by work activities*** or conditions not peculiar to the employee's employment. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). When an employee sustains a second work-related injury, as defined above, that injury need not be the primary factor in the resultant disability for compensation purposes. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

Significantly, the fact that the earlier injury was the "precipitant event" is not determinative. Rather, the determinative question is whether the employee's subsequent work ***aggravated or exacerbated*** the employee's condition first manifested earlier. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 243 (3rd Cir. 2002).

Finally, under the LHWCA, "disability" is defined, in part, as the "incapacity because of injury to earn the wages which the employee was receiving at the tin of injury in the same or any other employment. . . . " 33 U.S.C. §902(10). Accordingly, for there to be a finding of "disability," the employee must have an economic loss coupled with a physical impairment. *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 110 (1991).

In this claim, Morrison was able to ***function*** while working for OCS. His work with Danos & Curole caused ongoing, ***increasing*** pain. In other words, his physical condition was exacerbated. This was admitted by Morrison and the health care providers, and acknowledged by the Fifth Circuit. After working for Danos & Curole for ***five months***, Morrison's lumbar back stopped functioning.

This caused his disability, *i.e.*, his inability to earn wages. Morrison's continued flare-ups of pain and related events while working for Danos & Curole aggravated, accelerated, exacerbated, contributed to, and/or combined with the original injury.

This observation was compounded by the Fifth Circuit acknowledging that Dr. Gramlich and Dr. Wilson testified that Morrison's ongoing performance of his job with Danos & Curole very well could have exacerbated Morrison's condition; yet the Fifth Circuit proceeded to ignore these observations by ruling that there was no subsequent injury, notwithstanding that the substantial evidence clearly met the LHWCA's definition of "injury." In so doing, the Fifth Circuit accepted the health care providers' "lay" attempts to apply legal theories (*i.e.*, "natural progression" versus "exacerbation") to their medical world. Such an effort produces errant results, such as that reached herein. It also leads to inconsistent results among the circuit courts.

The most problematic issue inherent in the lower courts' decisions is the failure to distinguish the four cases discussed by Petitioners, all of which are directly on point, but reached contrary conclusions.

In *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102 (9th Cir. 2003), *cert. denied*, 534 U.S. 940, 125 S.Ct. 309 (2004), the court found that a ***one day*** minor aggravation (*e.g.*, increase in pain during the work day) was sufficient to place liability on the employer for which the employee worked at the time he went on disability. In that case, the employee was a mechanic and later a forklift driver, working for several different companies over the course of approximately 30

years. Early in his employment, he developed knee pain which increased over time. In 1992, he sought medical care for his knee condition and, in 1993, his physician stated that he would need a knee replacement. The employee continued to receive ongoing medical treatment, all the while working, and he eventually asked his doctor to schedule surgery. After the surgery was scheduled, the employee changed employers to another maritime employer, for which he worked for ***one day***. During the course of that day, as he performed his job duties, his pain became progressively worse. Surgery was performed two days later, and a claim was filed against that last maritime employer for which the employee had only worked one day. *Id.* at 1104. Citing the above law, the court held that the employee's "last employer is liable for all compensation due, even though prior employment may have contributed to the disability." *Id.* at 1104 (citing *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991)). Because the employee's work on that single day aggravated the underlying knee condition, there was a disability and the last maritime employer was held liable. *Id.* at 1105-07.

The instant case does not involve a ***one day*** aggravation – it involves a ***five month*** aggravation. No dispute exists that Morrison performed his regular job with Danos & Curole. Morrison testified that the harder he worked with Danos & Curole, the greater his back hurt. Morrison did not begin treatment with his neurosurgeon until five months after being hired by Danos & Curole. Accordingly, Danos & Curole should be deemed the last responsible employer.

In *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991), the employee worked as a pile

butt driver for the first employer. The second employer took over the operations from the first employer. The employee continued to work in the exact same job for an additional six months. At that time, the employee stopped working on the advice of his physician, due to his deteriorated back condition. *Id.* at 622. After reviewing the development of "the last employer rule," the court ruled that the employee suffered from a cumulative trauma with the second employer. *Id.* at 624. Significantly, the court observed that "the aggravation [two-injury] rule applies ***'even though the worker did not incur the greater part of his injury with that particular employer.'***" *Id.* (citing *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839-40 (9th Cir. 1991) (quoting *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 519 n.10 (5th Cir. 1986) (en banc))) (emphasis added). Because the substantial evidence demonstrated that the employee's current back condition "aggravated" his pre-existing back injury, the second employer was liable under the LHWCA. *Id.* at 624.

Like Danos & Curole herein, the second employer in *Foundation Constructors* argued that the employee's degenerative back condition was due entirely to the inevitable course of his injuries with the first employer. However, in dismissing this argument, the court correctly recognized that the physicians concluded that the continued work in a strenuous job was "harmful" to the employee's back condition. In fact, one physician attributed the employee's condition to "cumulative trauma" caused by his "extremely hard" work. *Id.* at 624. Accordingly, the second employer was liable for the entire disability.

The similarities between *Foundation Constructors* and the instant claim are uncanny. The employee in *Foundation Constructors* and Morrison worked for one employer

and, during their employment, the employers changed, but the employees' job duties and work locations remained the same. The employees worked for approximately the same amount of time for the subsequent employers before going on disability with back problems. These cases cannot be distinguished.

In *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233 (3rd Cir. 2002), the employee was a mechanic working for the first employer. At some point in mid-1996, the employee suffered a back injury during the course of his employment, causing him to undergo medical treatment. *Id.* at 235-37. In August 1997, the second employer acquired the first employer's interest in the facility where the employee was working. "Operations at the facility continued as before and the nature of [the employee's] work did not change after August of 1997." *Id.* at 237. After several months of work, performing the same job activities as before, the employee was placed on disability status. *Id.* at 237-39.

The court acknowledged that "if the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act." *Id.* at 241 (quotation omitted). "[W]here claimant's work results in a ***temporary exacerbation*** of symptoms, the employer ***at the time of the work events leading to this exacerbation is responsible for the resulting . . . disability.***" *Id.* (quotation omitted) (emphasis added). Importantly, the court observed that the employee's underlying degenerative disc disease "was to be expected," which required the employee to undergo certain medical treatment. "***However, he was able to continue work***" until his back

condition worsened to the point where he missed work. *Id.* at 242 (emphasis added).

The second employer argued that the employee's condition "was merely a natural progression of the original injury rather than the result of employment that aggravated or accelerated [the employee's] condition resulting in disability." *Id.* In response, the court asserted that "the fact that the earlier injury was the 'precipitant event' is not determinative. * * * the determinative question is whether [the employee's] subsequent work aggravated or exacerbated [the employee's] condition" first manifested with the first employer. *Id.* at 243 (quotation omitted). Accordingly, the second employer was liable for the disability.

Delaware River Stevedores, Inc. cannot be distinguished from this claim: both employees were mechanics, both worked for one employer with the operations being assumed by a subsequent employer during their employment, both employees' job duties and work locations remained the same, and both employees' physical conditions were aggravated or exacerbated by their work activities with the second employers.

In *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), the claimant suffered from a continuing shoulder rotator cuff tear. The claimant experienced flare-ups of pain, which disrupted his work with the first employer. He then voluntarily terminated his employment and accepted a job with the second employer. While working for the second employer, he suffered another flare-up of pain, causing him to miss work. He then brought identical claims against both employers. The court held that the second employer was responsible for the disability, because

it employed the claimant at the time of his most recent aggravation. The court also held that the disability resulted from the continued use of the claimant's arm, and each flare-up of pain represented cumulative trauma and aggravated the underlying injury which was compensable. *Id.* at 1311.

In the instant claim, Morrison experienced a work injury on October 16, 1997 while working for OCS. However, no "disability," as defined under the LHWCA, resulted from this accident. Rather, Morrison was placed on light duty for two or three hitches. Thereafter, he resumed his full duty position as a mechanic with OCS. Morrison ***never*** missed any work with OCS.

Morrison's performance of his strenuous job with Danos & Curole led him to experience numerous exacerbations of his pain. Importantly, Morrison independently reported to Dr. Wilson that as part of his job duties, he was required to carry some heavy tools with him, and he was required to lift some heavy things from the boat or swing over and do something. Morrison reported that "it was killing his back to do that stuff." Further, Morrison reported that the pain was exacerbated by bending for long periods of time and picking up weights. The most prominent exacerbation of his pain occurred after he worked on the major overhaul of an engine ***for Danos & Curole***, 15 to 16 hours per day, for seven straight days. The more he worked, the more his pain increased.

Morrison's work history and progressive physical condition, which ultimately disabled him after working for five months with Danos & Curole, is no different than the employees in *Metropolitan Stevedore Co.*, *Kelaita*, *Foundation Constructors*, and *Delaware River Stevedores, Inc.* As

in those cases, Danos & Curole, the second employer, should be held liable for Morrison's disability.

As aptly recognized by one court, the assignment of liability to Danos & Curole and Gray might seem harsh, because Morrison had suffered from a back injury with OCS.

> However, there is inherent virtue in the "last responsible employer" rule. Each employer subject to the LHWCA shares the risk that it will bear the burden of compensation at one point or another, even if it was not predominantly responsible for the compensable injury. The unfairness to the last employer is mitigated by two factors: the spreading of the risk through mandatory insurance, and the availability of the second injury fund to the last employer in some cases. * * * [T]his rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time.

Metropolitan Stevedore Co., 339 F.3d at 1107 (quotation omitted). Accordingly, Danos & Curole and Gray should be deemed the responsible employer and carrier.

CONCLUSION

Based on the foregoing argument, Petitioners request this Honorable Court to deem Danos & Curole and Gray the responsible employer and carrier, respectively. Further, Petitioners request that this Honorable Court order Danos & Curole and Gray to fully reimburse all benefits

paid to or on behalf of Morrison for this LHWCA claim to Zurich, and to be responsible for all future benefits under the LHWCA.

Respectfully submitted,

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APPENDIX

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, Petitioners v. DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON, Respondents

No. 04-60598

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

170 Fed. Appx. 931; 2006 U.S. App. LEXIS 7992

March 31, 2006, Filed

COUNSEL: For OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, Petitioners; ZURICH AMERICAN INSURANCE COMPANY, Petitioners: Glenn Martin Giles, Dallas, TX.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR: Thomas O Shepherd, Jr, Clerk, Benefits Review Board, Washington, DC; Donald Shire, Barry H Joyner, US Department of Labor, Washington, DC; Michael O Brewer, David Duhon, US Department of Labor, New Orleans, LA.

For DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE CO; JAMES MORRISON, Respondents: Douglass M Moragas, Harahan, LA.

For JAMES MORRISON, Respondent: Gregory Lewellyn, Columbia, LA.

JUDGES: Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

OPINION BY: KING

OPINION:

KING, Circuit Judge:*

Petitioners Operators & Consulting Services, Incorporated and Zurich American Insurance Company seek review of an order of the Department of Labor's Benefits Review Board. In this order, the Benefits Review Board affirmed the decision of an administrative law judge which imposed an employee's medical costs and disability payments upon Operators & Consulting Services under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* The petitioners argue that the Benefits Review Board misapplied the "aggravation rule" and erroneously concluded that the decision of the administrative law judge was supported by substantial evidence. For the reasons provided below, this petition for review is DENIED and the decision of the Benefits Review Board is AFFIRMED.

I. BACKGROUND

A. Factual Background

Pursuant to a contract with Burlington Resources ("Burlington"), petitioner Operators & Consulting Services, Inc. ("OCS") provided workers to operate an offshore

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

oil platform. OCS hired claimant-respondent James Morrison ("Morrison") to repair mechanical equipment on this platform. On October 16, 1997, Morrison injured his back while using a ladder on the platform.[1] One week after his injury, Morrison sought treatment from a chiropractor, Dr. Karri Gramlich ("Gramlich"), who treated Morrison on a regular basis until February 1998. After the accident, Morrison quickly returned to work. Initially restricted to light-duty work, he soon resumed his regular course of activity on the platform, although he continued to experience back pain. In February 1998, Gramlich cleared Morrison to return to the full scope of his previous duties and ceased to treat him, although Morrison continued to complain of discomfort and pain.

In May 1998, Burlington ended its contract with OCS and contracted with respondent Danos & Curole Marine Contractors, Inc. ("Danos & Curole") to provide similar services. Danos & Curole decided to retain Morrison in his position as field mechanic and formally hired him on May 8, 1998, after he successfully completed a pre-employment agility test. Morrison's physical discomfort persisted, however, and he returned to Gramlich for treatment on May 22, 1998.

At this time, Morrison complained to Gramlich of the familiar pain in his lower back, but he also reported numbness and tingling pain in his leg, symptoms which first appeared in March 1998 (before he began working for Danos & Curole). During the administrative hearing,

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[1] More specifically, Morrison testified that he injured his back as he swung over a tall guardrail while climbing down a ladder on a water tank.

Morrison testified that he was involved in several physically strenuous jobs while working for Danos & Curole, including a particularly arduous week in which he performed a total engine overhaul. Following physically strenuous jobs, his back pain would increase, but his symptoms would lessen following rest. Morrison also claimed that he did not think any specific event after the initial injury he suffered while working for OCS caused his condition to worsen, but rather that his back progressively "went down."

Gramlich continued this second round of treatment until September 1998. Despite her efforts, Morrison's condition showed little improvement, and she eventually referred him to a neurosurgeon, Dr. Andrew Wilson ("Wilson"). Wilson began treating Morrison on September 15, 1998, but Morrison's condition continued to worsen, and Wilson advised him to consider surgery. Because Morrison was unable to continue work, Danos & Curole terminated his employment on October 22, 1998. At his administrative hearing, Morrison testified that his condition continued to deteriorate even after he stopped working for Danos & Curole despite the fact that he had wholly avoided strenuous physical activity. Wilson's testimony generally tended to confirm Morrison's account. After a series of diagnostic tests revealed a disc herniation and nerve root impingement, Wilson performed lumbar fusion surgery on July 9, 2001. On June 6, 2002, Wilson declared that Morrison's condition had improved as much as possible, but that Morrison would be left with an eighteen percent whole body impairment, permanently limiting him to light-duty work in the future.

B. Procedural Background

Morrison filed claims for disability compensation and medical expenses against both OCS and Danos & Curole pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* [hereinafter "LHWCA" or "Act"]. OCS voluntarily paid Morrison temporary total disability compensation from September 23, 1998 to June 5, 2002; thereafter, OCS paid Morrison permanent partial disability and medical benefits. OCS asserted that Danos & Curole should be liable for all subsequent and further disability and medical benefits because Morrison's work for Danos & Curole aggravated his original condition. Danos & Curole denied responsibility for Morrison's disability, arguing that it resulted from the natural progression of the injury Morrison suffered on October 16, 1997, while working for OCS.

A formal administrative hearing was held before an administrative law judge ("ALJ") on January 23, 2003. The only issue considered at any length by the ALJ was which of the two employers – OCS or Danos & Curole – was responsible for Morrison's medical expenses and disability compensation. During the hearing, the ALJ considered testimony and evidence provided by Morrison, Gramlich, Wilson, Dr. Anthony Ioppolo, a neurosurgeon who examined Morrison on behalf of OCS on three different occasions, and Martin Knijn ("Knijn"), a physical therapist who conducted Morrison's pre-employment evaluation for Danos & Curole.

On April 16, 2003, the ALJ issued his decision. In this decision, the ALJ accepted Danos & Curole's arguments, finding both that Morrison's disability was attributable to

the natural progression of the injury he suffered in October of 1997 while working for OCS and that his deteriorating back condition was not aggravated during his brief employment with Danos & Curole. Guided in part by this court's en banc opinion in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986), and based on Wilson's and Gramlich's testimony, as well as Morrison's own description of his symptoms, the ALJ concluded that Morrison's medical condition and resultant surgery were the consequence of his injury on October 16, 1997, and were neither caused nor aggravated by his subsequent employment with Danos & Curole. As a result, the ALJ held OCS responsible for all of Morrison's medical and disability benefits.

OCS appealed the ALJ's decision to the Department of Labor's Benefits Review Board ("BRB" or "Board"), which affirmed the ALJ's ruling on May 14, 2004. In its appeal, OCS essentially argued that the ALJ erred in failing to find that Morrison's underlying back condition was aggravated by his employment duties with Danos & Curole. The BRB rejected OCS's arguments, finding that the characterization of the record evidence and the assessment of the witnesses' credibility offered by OCS did not provide a basis for overturning the ALJ's credibility determinations and evaluation of the evidence.

The petitioners filed their initial petition for review with this court on July 12, 2004.

II. DISCUSSION

The only seriously contested issue before the ALJ was which employer and carrier were liable for Morrison's disability. An administrative fact finder in a case such as

this must apply the "aggravation rule," which requires a detailed examination of the case-specific medical evidence. "The aggravation rule is a doctrine of general workers' compensation law which provides that, where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Strachan*, 782 F.2d at 517 (citing A. Larson, Law of Workmen's Compensation (1982)); *see also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir.2003) (stating that an employer is liable under the aggravation rule when an employment injury creates, worsens, or combines with a preexisting condition to create a new and greater disability). Where the preexisting impairment results from an injury which occurred during the course of employment with a prior employer such as OCS, a second or final employer such as Danos & Curole is liable under the aggravation rule for the entire cost of an employee's disability if the preexisting impairment was aggravated during the course of the employee's second or final employment. On the other hand, a first employer such as OCS is liable if the employee's ultimate medical condition arises from the "natural progression" of an injury that occurred during the course of the employee's first employment.[2] *Metro. Stevedore Co. v. Crescent Wharf and Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir.2003).

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[2] The aggravation rule is often known as the "last employer rule," although the two terms are probably not precisely interchangeable; rather, it may be more correct to say that the aggravation rule is the "two-injury branch" of the last employer rule. *See Found. Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991) (discussing same); *see also Metro. Stevedore*, 339 F.3d at 1104-05 (discussing

(Continued on following page)

In *Strachan*, this court noted both that "the aggravation rule has been consistently applied by this Court in longshoremen cases" and that "the aggravation rule is well-grounded in the statutory language of the LHWCA" – specifically 33 U.S.C. § 903(a), which provides that "compensation shall be payable . . . in respect of disability or death of an employee," 33 U.S.C. § 902(10), which defines disability as "incapacity because of injury," and 33 U.S.C. § 908(f), which provides for payments to employees out of the industry-financed second injury fund. *Strachan*, 782 F.2d at 517. *See also Louis Dreyfus Corp. v. Dir., OWCP*, 125 F.3d 884, 887 (5th Cir. 1997) (stating that under the LHWCA, "employers are liable for the full costs of a worker's disability, even if the disability is the result of both a pre-existing impairment and a current employment injury; this is known as the 'aggravation rule' ").

"two-injury" cases, "occupational disease" cases, aggravating or cumulative traumas, and the "last responsible employer rule").

Technical issues of nomenclature aside, it is clear that for the second or last employer to be liable in a case such as this, there must be evidence of additional trauma or damage that [[As the] [ ]] occurred in the course of the second or last employment. As the Fourth Circuit recently held in a case similar to the matter at hand,

> the "aggravation rule" might apply . . . to a situation where a second trauma occurs in an area first injured during the claimant's prior employment, but since healed to the extent possible. In that instance, the subsequent employer is justifiably responsible for the entire resultant injury. . . . Here, however . . . the ALJ found . . . there was no "second trauma"; instead, there was simply an onset of complications from the *first* trauma.

Admiralty Coatings Corp. v. Emery, 228 F.3d 513, 518 (4th Cir.2000). Here, as in *Admiralty Coatings*, the ALJ's factual finding that Morrison's back injury was not exacerbated by a second trauma fully accorded with the aggravation rule.

The aggravation rule is applied in the other circuits as well. *See, e.g., Marinette Marine Corp. v. OWCP*, 431 F.3d 1032, 1034 (7th Cir. 2005) (stating that under the aggravation rule, a subsequent employer is responsible if the subsequent employment aggravated an earlier injury, but that first employers are responsible if an employee's ultimate condition is attributable to the natural progression of the earlier injury); *Metro. Stevedore*, 339 F.3d at 1105 (stating that "if the worker's ultimate disability is the result of the natural progression of the injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer").

The central task for appellate courts addressing petitions for review from administrative decisions that apply the aggravation rule is the "need to decide whether the ALJ's . . . finding is worthy of deference." *Marinette*, 431 F.3d at 1032. This court reviews "decisions of the Board to determine only whether it 'correctly concluded that the Administrative Law Judge's order was supported by substantial evidence on the record as a whole and is in accordance with law.'" *Conoco, Inc. v. Dir., OWCP*, 194 F.3d 684, 687 (5th Cir. 1999) (quoting *Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163, 165 (5th Cir. 1993)).

Substantial evidence in this context "is that relevant evidence – more than a scintilla but less than a preponderance – that would cause a reasonable person to accept the fact finding." *Dir., OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 305 (5th Cir. 1997) (citing *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir. 1996)). Because we lack "the expertise necessary to properly evaluate the complex and frequently conflicting testimony of neurological surgeons, orthopedists, and other medical experts. . . . we

must leave this particular fact finding decision precisely where Congress placed it – with the ALJ." *Ceres Marine Terminal v. Dir., OWCP*, 118 F.3d 387, 391 (5th Cir. 1997). "It is fundamental that credibility determinations and the resolution of conflicting evidence are the prerogative of the fact finder, here the ALJ," and the ALJ "'is not bound to accept the opinion of any particular medical expert; he is entitled to weigh the medical evidence including the relative credibility of the competing experts. . . . '" *Atl. Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981) (internal citations omitted) (quoting *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 759 (5th Cir. 1981)). On the other hand, statutory interpretations and other decisions of law made by the BRB are reviewed by this court de novo. *Cooper/T.Smith Stevedoring Co. v. Liuzza*, 293 F.3d 741, 744 (5th Cir. 2002) (citing *Equitable Equip. Co. v. Dir., OWCP*, 191 F.3d 630, 631 (5th Cir. 1999)).

The ALJ's decision to impose the costs of Morrison's injury upon OCS was supported by substantial evidence in the record, including, but by no means limited to, the testimony of Wilson and Gramlich. Wilson observed that the flare-ups in pain Morrison suffered while he worked for Danos & Curole did not necessarily indicate that Morrison's disc was suffering further damage while he worked for Danos & Curole. Rather, Wilson claimed that these flare-ups of pain were manifestations of the original physical damage that occurred while Morrison worked for OCS. Although Wilson admitted that Morrison's employment with Danos & Curole might have exacerbated the damage Morrison suffered while working for OCS, he concluded that Morrison's ultimate condition was wholly

attributable to the natural progression of his initial injury.[3] *See, e.g.*, Wilson Dep. 71, 76, 86. Similarly, although Gramlich conceded that working for Danos & Curole might have exacerbated Morrison's condition, she concluded that Morrison's ultimate condition was wholly attributable to the original injury Morrison suffered while

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[3] The following exchange provides a representative example of the evidence provided by Wilson's deposition:

> WILSON: Yeah. In my mind it all flowed, and that's how he ended up getting an operation. And because of the fact that he hurt himself, initially.
>
> QUESTION: And it was a natural progression in your opinion?
>
> WILSON: Yes.
>
> . . . .
>
> WILSON: If the question is, Do I think he hurt himself at the original time when he hurt himself in October. I guess, that's where I thought it all occurred. And I've had lots of patients do well and then they get worse and then they do better and then they get worse and then they eventually need an operation. These are all very interesting questions in terms of like, what was the final thing that broke the camel's back.
>
> QUESTION: And you just can't say that one way or the other, can you
>
> WILSON: Except for the fact that he told me that he hurt his back at that one point in time. And that's where I'd say – if I had to draw a line, I'd say, Okay, I'm drawing the line and the guy says he hurt his back here. And from that point on I met him and we did a lot of things to him and he's gone through a lot.

(Wilson Dep. 86, 101.)

he was employed by OCS.[4] *See, e.g.*, Gramlich Dep. at 41-42, 52.

We are neither doctors nor the original fact finders in this matter, and so, under the appropriate standard of review, we need not assess the plausibility of these medical accounts, nor do we assess the weight they should be

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[4] The following exchange provides a representative example of the evidence provided by Gramlich's deposition:

> GRAMLICH: My opinion is that the disk was created by the injury, the original injury.
>
> QUESTION: And had it not been for this, Mr. Morrison would not have required surgery; is that correct?
>
> GRAMLICH: That's correct. But again, I would refer to Dr. Wilson for his opinion since I don't do surgery.
>
> QUESTION: Based in your area of expertise, this would be your opinion?
>
> GRAMLICH: Yes.
>
> . . . .
>
> QUESTION: Let's get this clarified. If we could just get something clarified. When you say symptoms are relieved, it does not necessarily mean that the underlying condition resolved itself satisfactorily?
>
> GRAMLICH: Correct.
>
> QUESTION: He may still have a bulging disk, but he may not be experiencing a great degree of symptomatology?
>
> GRAMLICH: Correct.
>
> . . . .
>
> QUESTION: Doctor, during that preplacement evaluation [conducted by Knijn in May 1998], Mr. Morrison reported no pain or discomfort. Does that change your opinion regarding whether he was able to do those activities or whether those activities [at Danos & Curole] caused the related new symptomatology?
>
> GRAMLICH: I wasn't there with him. I still believe the accident created a disk problem in October of '97.

(Gramlich Dep. 41-42, 49, 51-52.)

accorded relative to other evidence in the record. *See Pool Co. v. Cooper*, 274 F.3d 173, 178 (5th Cir. 2001) (stating that "like the BRB, 'we may not substitute our judgment for that of the ALJ, nor reweigh or reappraise the evidence, but may only determine whether evidence exists to support the ALJ's findings'") (quoting *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 1030-31 (5th Cir. 1997)). Our task is more limited: we ask only whether this evidence was relevant to the ALJ's decision, and whether the ALJ's decision was reasonable based on this evidence. *Ceres*, 118 F.3d at 389. Wilson and Gramlich, who were ably cross-examined by OCS's counsel, concluded that Morrison's ultimate disability was the natural progression of the initial injury he suffered while working for OCS. This evidence was directly relevant to the ALJ's decision, and the ALJ's decision was reasonable in light of this evidence; therefore, we hold that the BRB correctly found that the ALJ's decision was supported by substantial evidence.

III. CONCLUSION

For the reasons stated above, the petition for review is DENIED, and the decision of the BRB is AFFIRMED.

BENEFITS REVIEW BOARD

BRB No. 03-0541

JAMES MORRISON Claimant-Respondent v. OPERATORS AND CONSULTING SERVICES, INCORPORATED and ZURICH AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioners DANOS & CUROLE MARINE CONTRACTORS, INCORPORATED and THE GRAY INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: May 14, 2004 DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph B. Guilbeau and Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for Operators and Consulting Services, Inc. and Zurich American Insurance Company.

Douglass M. Moragas, Harahan, Louisiana, for Danos & Curole Marine Contractors, Inc. and the Gray Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Operators and Consulting Services, Inc. (OCS) appeals the Decision and Order (2002-LHC-0952) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, during the course of his employment as a field mechanic for OCS, injured his back on October 16, 1997, while working on an offshore platform.[1] After returning to shore, claimant obtained chiropractic treatment from Dr. Gramlich. Thereafter, claimant worked a few hitches of light duty work, and then resumed his regular duties on the platform, although he continued to experience back pain. Dr. Gramlich treated claimant until February 1998, when he had reached a plateau in his recovery and the doctor advised him to return to her if his pain worsened. DX 14 at 24-25, 39; Tr. at 34-36, 53-55, 72, 82-83. In May 1998, Burlington Resources, the platform operator, terminated its contract with OCS, and contracted with Danos & Curole Marine Contractors, Inc. (Danos) to

provide workers for the platform. After successfully completing a pre-employment agility test, claimant was hired by Danos on May 8, 1998, to perform the same duties as a field mechanic that he had previously performed for OCS. DXS 9; 15; Tr. at 37-38, 42-45, 59-63, 68-69. In May 1998, claimant returned to Dr. Gramlich because of numbness and tingling in his left leg, symptoms which had worsened since they first developed in March 1998. DX 14 at 25-26, 37, 44-47; Tr. at 36, 45, 57-58, 72-73, 83. Dr. Gramlich resumed treatment of claimant, but when his continued back pain and left leg symptoms had not resolved by September 1998, she referred him to Dr. Wilson, a neurosurgeon. DX 14 at 24-27, 38-39, 43-47; Tr. at 39, 65-66, 73, 90. After initiating treatment with Dr. Wilson on September 15, 1998, claimant stopped working and was terminated by Danos on October 22, 1998. DXS 1; 12 at 8; Tr. at 39-40, 65, 78, 85. Because a series of diagnostic tests revealed a disc herniation and nerve root impingement, and claimant's complaints of pain worsened, Dr. Wilson performed a lumbar fusion on July 9, 2001. DXS 1; 12. Claimant filed claims under the Act against both OCS and Danos. EX 9. Although OCS voluntarily paid claimant temporary total disability compensation from September 23, 1998 to June 5, 2002, and thereafter permanent partial disability and medical benefits, *see* JX 1; DX 6; Tr. at 20, it asserted that Danos should be held liable for all disability and medical benefits due claimant on the basis that claimant's work for Danos aggravated his initial injury, resulting in his disability. The sole issue presented at the formal hearing was the determination of the employer responsible for claimant's disability and medical benefits. Decision and Order at 2; JX 1.

In his Decision and Order, the administrative law judge determined that claimant's disabling back condition resulted from the natural progression of his October 16, 1997 injury with OCS. The administrative law judge thus found OCS to be responsible for all disability and medical benefits due claimant.

On appeal, OCS challenges the administrative law judge's responsible employer determination. Danos responds, urging affirmance of the administrative law judge's decision in its entirety.

OCS essentially argues on appeal that the administrative law judge erred in failing to find that claimant's underlying back condition was aggravated by his employment duties with Danos. In cases under the Act involving multiple traumatic injuries, the determination of the employer responsible for the payment of claimant's benefits turns on whether the claimant's condition is the result of the natural progression or an aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the claimant's employer at the time of that injury is the employer responsible for compensating the claimant for the entire disability. If, on the other hand, the conditions of employment with a subsequent employer aggravated, accelerated, or combined with the earlier injury, resulting in the claimant's disability, the employer at the time of the second injury is liable for all medical expenses and compensation related thereto. *See Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price],* 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Delaware River Stevedores, Inc. v. Director, OWCP,* 279 F.3d 233, 35 BRBS 154(CRT) (3d Cr. 2002); *Foundation Constructors, Inc. v. Director, OWCP,*

950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Siminski v. Ceres Marine Terminals,* 35 BRBS 136 (2001).

In seeking to overturn the administrative law judge's responsible employer determination, OCS initially argues that the administrative law judge erred in concluding that claimant's initial injury was not aggravated by his subsequent employment with Danos on the basis that claimant did not sustain a specific traumatic accident while working for Danos.[2] OCS br. at 16-18. Contrary to OCS's assertion, however, a review of the administrative law judge's decision reveals that the administrative law judge applied the correct legal standard when considering whether claimant's ongoing work performance with Danos aggravated or combined with his prior back injury to create his ultimate disability.[3] Decision and Order at 15-16; *Price,* 339 F.3d at 1105, 37 BRBS at 90(CRT). Accordingly, we reject OCS's initial allegation of error.

OCS next contends that the administrative law judge's responsible employer determination is not supported by substantial evidence. We disagree. In determining that claimant's present disability is the result of the natural progression of his October 16, 1997, original injury, the administrative law judge credited the testimony of Drs. Wilson and Gramlich, as well as claimant's testimony regarding his symptoms and work activities. Decision and Order at 14-16. The administrative law judge found that claimant's condition had not resolved at the time he began working for Danos and that claimant did not become symptomatic because of an aggravation occurring as a result of his employment with Danos. The administrative law judge credited claimant's testimony that his back condition progressively deteriorated from the time of his initial injury on October 16, 1997, that he continued to

experience lower back pain in February 1998, and that he first experienced left leg symptoms in March 1998, prior to the date he commenced work for Danos. Decision and Order at 14-15; DX 14 at 24-26, 37, 44-47; Tr. at 34-36, 45, 53-58, 65, 72-74, 80-85. The administrative law judge next determined that claimant's successful completion of Danos's pre-employment agility test did not establish that his back condition had resolved by May 1998, having inferred from the testimony of claimant and Mr. Knijn, the physical therapist who administered the test, that claimant's successful completion of the test demonstrated only that claimant was capable of performing most of his job duties for a limited amount of time. Decision and Order at 15; Tr. at 60-62, 68-69, 77, 85-87; DXS 11, 15. Moreover, the administrative law judge fully considered claimant's testimony regarding his work duties at Danos, finding that such testimony did not demonstrate that claimant's disabling back condition was the result of an aggravation sustained in the performance of his work at Danos.[4] Decision and Order at 15-16. Lastly, the administrative law judge credited the opinions of claimant's treating physicians, Dr. Wilson, a neurosurgeon, and Dr. Gramlich, a chiropractor, which he found constituted substantial evidence supporting his determination that claimant's disabling back condition is the result of the natural progression of his October 16, 1997 injury.[5] Decision and Order at 16; DXS 12 at 68-71, 76-77, 80-86, 97-98, 101-106; 14 at 39-41, 49, 52.

Although OCS argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony, we conclude that the competing characterization of the record evidence and assessment of the witnesses' credibility

offered by OCS does not provide a basis for overturning the administrative law judge's credibility determinations and evaluation of the evidence. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating the evidence of record. *See James J. Flanagan Stevedores, Inc. v. Gallagher,* 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 U.S. 954 (1963). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). As the administrative law judge's assessment of the credibility of each of these witnesses and his inferences drawn from the record evidence are rational, they are affirmed. *Id.* We hold that the administrative law judge's finding that claimant's disabling back condition is due to the natural progression of his October 16, 1997 injury at OCS and that OCS is the responsible employer is supported by substantial evidence and is consistent with the applicable legal principles and is therefore affirmed. *See Price,* 339 F.3d 1102, 37 BRBS 89(CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

BETTY JEAN HALL

Administrative Appeals Judge

NOTE: This is a LHCA Unpublished Document

[1] Claimant testified that in order to climb down a ladder from the top of a water tank to the platform below, he had to swing his leg over a tall guardrail on the water tank; as he did so he felt an excruciating pain in his lower back. He took the rest of the day off, and thereafter performed light duty for the remainder of his seven-day hitch on the platform. *See* Tr. at 32-33, 52-53, 69-71.

[2] OCS correctly notes that the issue of whether claimant would have required back surgery regardless of his work at Danos is not dispositive of the responsible employer issue. *See* OCS br. at 17; *Price,* 339 F.3d at 1107, 37 BRBS at 91(CRT). The administrative law judge, however, did not base his responsible employer determination on a finding that claimant eventually would have required surgery notwithstanding his employment with Danos. Similarly, OCS asserts that a second injury need not be the *primary* factor in the resultant disability and that the fact that the initial injury was the precipitant event is not determinative of the responsible employer. *See* OCS P/R at 18; *Delaware River Stevedores, Inc.,* 279 F.3d at 243, 35 BRBS at 161(CRT); *Foundation Constructors, Inc.,* 950 F.2d at 624, 25 BRBS at 75 (CRT). The administrative law judge in the instant case, however, did not base his responsible employer determination on these factors.

[3] OCS correctly states that the aggravation of an underlying condition need not be produced by an identifiable traumatic incident, but may be caused by cumulative trauma resulting from work activities or conditions. *See* OCS br. at 17-18; *Foundation Constructors,* 950 F.2d 621, 25 BRBS 71(CRT); *Kelaita v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). OCS similarly argues that the evidence in the instant case that claimant's

symptoms were temporarily exacerbated by his performance of strenuous work for Danos, is sufficient to hold Danos liable as responsible employer. *See* OCS br. at 20-21. However, the fact that the claimant sustained a temporary exacerbation with a subsequent employer is not determinative of the responsible employer issue. Rather, in cases involving multiple traumatic injuries, the responsible employer determination depends on the cause of the claimant's *ultimate disability;* only if the disability is at least partially the result of trauma sustained in employment with a subsequent employer is the subsequent employer liable. *See Price,* 339 F.3d at 1105, 37 BRBS at 90(CRT). If, on the other hand, the ultimate disability results from the natural progression of the initial injury, and not from any subsequent trauma, the first employer remains liable. *Id.*

[4] The administrative law judge credited claimant's testimony that he "worked smart" and availed himself of help from other employees and machines in performing jobs involving lifting and other physical demands. Decision and Order at 15; Tr. at 43-46, 49-51, 75-78, 81.

[5] Citing Dr. Wilson's deposition testimony indicating that claimant's flare-ups represented cumulative trauma which aggravated claimant's back condition, OCS assigns error to the administrative law judge's finding that Dr. Wilson's opinion supports a finding that claimant's disability is the result of the natural progression of his initial injury. OCS br. at 25; DX 12 at 52, 68, 97-98. The administrative law judge, however, explicitly recognized that Dr. Wilson acknowledged the possibility that claimant's work for Danos may have exacerbated his condition, but the administrative law judge found that Dr. Wilson's testimony, considered in its entirety, reflected his opinion that claimant's condition was the result of the natural progression of his initial injury. Decision and Order at 7-10, 16.

OCS further avers that Dr. Ioppolo's opinion supports a finding that claimant's condition was exacerbated by his employment with Danos. OCS br. at 25; DX 13 at 39-40, 46-47, 84. However, Dr. Ioppolo also testified that it was equally probable that claimant's back condition was the result of natural progression of the initial injury. DX 13 at 80-81.

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY, Petitioners, versus DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON, Respondents.

No. 04-60598 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

130 Fed. Appx. 692; 2005 U.S. App. LEXIS 8397

May 12, 2005, Filed

JUDGES: Before JONES, BARKSDALE and PRADO, Circuit Judges.

OPINION BY: Edward C. Prado

OPINION: EDWARD C. PRADO, Circuit Judge:*

This appeal involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act").[1] In their petition for review, petitioners Operators and Consulting Services, Inc. and Zurich American Insurance Company (together, "OCS") ask this court to set aside an order by the Administrative Law Judge ("ALJ") holding them responsible for the claimant's

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

[1] 33 U.S.C. §§ 901-50.

disability compensation and medical costs. For the reasons discussed below, this court denies OCS's petition for review.

Factual Background

Before the injury which is at the heart of this appeal occurred, OCS provided workers for the operation of an offshore platform pursuant to a contract with Burlington Resources. OCS hired claimant-respondent James Morrison as a field mechanic to repair mechanical equipment on the platform. As a mechanic, Morrison was required to carry equipment weighing up to 75 pounds. On October 16, 1997, Morrison injured his back while climbing up a ladder. A week after the accident, Morrison sought treatment for his injury from Dr. Karri Gramlich, a chiropractor. Dr. Gramlich treated Morrison until February 1998, at which point she reported that Morrison was ready to resume work on a normal basis.

In May 1998, Burlington Resources terminated its contract with OCS and contracted with respondent Danos & Curole Marine Contractors ("Danos & Curole") to provide workers for the platform. Danos & Curole hired Morrison on May 8, 1998 after he successfully completed a preemployment agility test. On May 22, Morrison returned to Dr. Gramlich for treatment, complaining of pain in his left leg. Dr. Gramlich treated Morrison until September 1998. Because his condition showed little improvement, Dr. Gramlich referred Morrison to Dr. Andrew Wilson, a neurosurgeon. Dr. Wilson began treating Morrison on September 15, 1998, but Morrison's condition worsened to the point that he was unable to continue working. Danos

& Curole terminated Morrison on October 22, 1998. Dr. Wilson operated on Morrison's back on July 9, 2001.

Morrison filed claims for disability compensation and medical expenses under the Act against both OCS and Danos & Curole. Danos & Curole denied responsibility for Morrison's disability, maintaining that the disability resulted from the natural progression of the October 16, 1997 injury Morrison suffered while working for OCS. After considering the evidence, the ALJ agreed with Danos & Curole. The ALJ found that Morrison's disability was attributable to the injury he sustained while working for OCS and that Morrison's back condition was not aggravated by his employment with Danos & Curole. The ALJ, therefore, concluded that OCS was responsible for all of Morrison's disability compensation and medical expenses.

OCS appealed to the Department of Labor's Benefits Review Board ("the Board"). The Board affirmed the ALJ's ruling. OCS now asks this court to set aside the ALJ's order.

Standard of Review

This court reviews a decision of the Board using the same standard the Board applies to review a decision of the ALJ.[2] That is, this court determines whether the ALJ's decision is supported by substantial evidence.[3] "Substantial evidence is that relevant evidence – more than a scintilla but less than a preponderance – that would cause

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[2] *SGS Control Servs. v. Dir., Office of Worker's Comp. Programs, United States DOL*, 86 F.3d 438, 440 (5th Cir. 1996).

[3] *SGS Control Servs.*, 86 F.3d at 440.

a reasonable person to accept the fact finding."[4] This court may not substitute its judgment for that of the ALJ, nor reweigh or reappraise the evidence; instead, it may only determine whether evidence exists to support the ALJ's findings.[5] This court will uphold the Board's decision if the ALJ's decision is supported by substantial evidence.[6]

Analysis

OCS challenges the ALJ's determination that it is solely responsible for Morrison's disability. OCS maintains that Morrison's injury was aggravated while he worked for Danos & Curole, and that as a result, Danos & Curole is liable for the costs of Morrison's disability. Specifically, OCS contends that the ALJ misapplied the "aggravation rule."

The "aggravation rule" is a judicially created rule for allocating liability among employers for a worker's injury.[7] The rule provides that if a claimant's disability arose from the natural progression of an injury sustained while working for the first employer, that employer is completely liable for the subsequent expenses the claimant incurs from the injury, even after the claimant no longer works

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[4] *Dir., Office of Workers' Comp. Programs, United States DOL v. Ingalls Shipbuilding*, 125 F.3d 303, 305 (5th Cir. 1997).

[5] *SGS Control Servs.*, 86 F.3d at 440.

[6] 33 U.S.C. § 921(b)(3).

[7] *See Cooper/t. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 749 (5th Cir. 2002) (discussing the aggravation rule for allocating liability for an occupational disease that develops after prolonged exposure to an injurious stimuli).

for the first employer.[8] However, in cases where the disability results from cumulative traumas, the responsible employer depends upon the cause of the worker's ultimate disability.[9] If the disability is "at least partially the result of a second trauma that occurs while working for a second employer and that injury aggravates, accelerates or combines with the prior injury to create the ultimate disability," the second employer is liable for all medical expenses and compensation.[10] Thus, the dispositive issue in this appeal is whether Morrison's disability arose from the natural progression of the injury suffered on October 16, 1997 while he worked for OCS, or whether his disability was caused by an aggravation, exacerbation, or acceleration of that injury while he worked for Danos & Curole.

Here, substantial evidence supports the ALJ's finding that Morrison's disability resulted solely from the injury he suffered during his employment with OCS. Dr. Wilson testified in his deposition that he began treating Morrison in September 1998. Dr. Wilson opined that Morrison's injury naturally progressed to the point that surgery was the only way to mitigate further damage. Dr. Wilson admitted, however, that there was a possibility that Morrison's employment with Danos & Curole exacerbated Morrison's condition.

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[8] *See Metro. Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 1105 (9th Cir. 2003) (describing the last responsible employer rule – otherwise known as the aggravation rule – in the context of an occupational disease); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (explaining that this circuit has consistently applied the aggravation rule in longshoremen cases).

[9] *Metro. Stevedore Co.*, 339 F.3d at 1105.

[10] *Id.*

Dr. Gramlich also attributed Morrison's surgery to the injury that occurred in October 1997. She acknowledged that working for Danos & Curole may have aggravated Morrison's back condition, but opined that the herniated disk that required surgery resulted from Morrison's original injury during his employment with OCS.

In addition, Morrison testified that he continued to experience lower back pain while working for OCS. Morris explained that nothing about his job changed when he began working for Danos & Curole. He stated that he continued to perform the same job on the same platforms, but explained that he worked smarter to avoid hurting his back. He described his job with Danos & Curole as neither more nor less strenuous than his work with OCS. Together, testimony from these witnesses constitutes substantial evidence that Morrison's disability resulted from the natural progression of the injury he suffered in October 1997.

OCS argues that passing the preemployment agility test shows that Morrison's back was no longer impaired when he began working for Danos & Curole. However, Martin Knijn, the physical therapist who conducted the agility test, testified that the test was designed to test capabilities, not the amount of stress the back could sustain. Knijn explained that the successful completion of the test demonstrates that an employee is capable of performing most of his job duties for a limited amount of time. Thus, passing a preemployment agility test does not necessarily indicate that Morrison's initial back injury was resolved by the time he began working for Danos & Curole.

OCS also argues that Morrison's strenuous work activities with Danos & Curole over a five month period demonstrate that the disability arose from an aggravation or acceleration of a preexisting injury. Morrison, however, testified that his job with Danos & Curole was neither more nor less strenuous than his work with OCS, and he did not testify that he suffered a subsequent injury. Although Morrison explained that Dr. Gramlich released him to return to work for OCS, substantial evidence indicates that he was not symptom-free at that time and that his pain progressively increased throughout the time he worked for OCS.

Substantial evidence supports the ALJ's finding that Morrison's disability resulted from the natural progression of his October 1997 injury; thus, under the "aggravation rule," OCS, as the first employer, is solely responsible for Morrison's disability.

Conclusion

The ALJ did not err by determining that OCS is responsible for Morrison's disability compensation and medical costs because substantial evidence indicates that Morrison's disability was caused by his injury while working for OCS. As a result, the Board properly affirmed the ALJ's decision. Consequently, this court DENIES the petition for review.

PETITION DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60598
Summary Calendar

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON,

Respondents.

Petition for Review of an Order
of the Benefits Review Board
03-0541

(Filed July 25, 2005)

Before JONES, BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:

The court on its own motion VACATES the opinion issued in this case on May 12, 2005 and DENIES the petitioners' motion for rehearing en banc as moot. The court DIRECTS the clerk to schedule this appeal for oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60598

OPERATORS & CONSULTING SERVICES, INCORPORATED; ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR; DANOS & CUROLE MARINE CONTRACTORS INCORPORATED; GRAY INSURANCE COMPANY; JAMES MORRISON,

Respondents

Petition for Review of an Order
of the Benefits Review Board

ON PETITION FOR REHEARING EN BANC

(Filed May 22, 2006)

(Opinion 03/31/06, 5 Cir., ___, ___ F.3d ___)

Before JONES, Chief Judge, and KING and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

(2)

No. 06-250

Supreme Court, U.S.
FILED
SEP 22 2006

In The

Supreme Court of the United States

OPERATORS CONSULTING SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DANOS & CUROLE MARINE CONTRACTORS, INC., THE GRAY INSURANCE COMPANY, AND JAMES MORRISON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The Respondents, Danos & Curole Marine Contractors, Inc. and The Gray Insurance Company do not have any parent companies.

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SUMMARY OF THE ARGUMENT

The Fifth Circuit in its Decision correctly applied the Last Responsible Employer Rule, and did so in a manner consistent with the other Circuit Courts, which have applied this rule. They were correct in concluding that the Decision of the Administrative Law Judge was supported by substantial evidence as a whole and was in accordance with the law.

ARGUMENT

A. Statement of Facts

The Statement of Facts as presented by the Petitioners is misleading and erroneous. On October 16, 1997 the claimant, James Morrison, sustained a severe injury to his lumbar spine while working for OCS. He performed light duty for a limited period of time than resumed his regular duties. When he resumed his regular duties, he took extra precautions to avoid reinjuring his back. He worked smarter and more cautiously. His functional capacity was effected by that injury, but he did his job anyway. In March, 1998, while still working for OCS, he developed sciatic symptoms of the left leg. Because these symptoms persisted, he returned to the treating physician, Dr. Gramlich. This return visit was in May, 1998, after he had begun working for Danos & Curole. Because of these symptoms, which began prior to his employment with Danos and which were caused by his injury with OCS, Dr. Gramlich resumed treatment on a regular basis, while he continued to work. Dr. Gramlich testified that, because the symptoms persisted and were not resolved by September of 1998, a neurosurgical consultation was indicated, and she referred him to a neurosurgeon, Dr. Wilson. Dr. Wilson

suggested that he stop working for a while and the claimant followed his suggestion. At that time Dr. Wilson said the claimant was robust, in good shape and tough looking. The claimant did not return to work after that. After that, in spite of not working, his condition deteriorated to the point that he had to undergo lumbar surgery. This was in 2001, at which time Dr. Wilson noted that the claimant looked debilitated and markedly aged and was in severe pain and exhibited additional symptoms.

The petitioners are distorting the testimony of Doctor Wilson when the say he testified that the claimant would not have needed surgery had he stopped work in April, before he went to work for Danos. He actually testified that he could not testify to that. The counsel for OCS asked that same question later on re-direct and the Doctor told him that he was not of that opinion. He stated quite clearly he could not agree with such a conclusion. Throughout his testimony, he made it repeatedly clear that his opinion was that the claimant's condition was a natural progression of the injury sustained with OCS in October of 1997. It was a continuum and it was not a result of any aggravation while working for Danos. A review of Dr. Gramlich's entire testimony shows that she was of the same opinion, that is, that the claimant's disability was a result of the natural progression of the injury sustained by the claimant while working for Operators and Consulting Services, the first employer. The claimant's testimony and other evidence supported that same conclusion.

B. The Fifth Circuit Correctly Applied the Last Employer Rule

The sole contention made by the petitioners is that the Fifth Circuit in its Decision applied the "last employer

rule" differently than the Ninth and Third Circuit Courts, and is, therefore in conflict with them. In reading the Fifth Circuit's Decision, one clearly sees that the rule applied by them is the exact same rule as the one applied by those and other Circuits. Furthermore, it is equally clear that they applied that rule in the same exact way that the other Circuits applied it.

The petitioners assert that the Fifth Circuit's Decision is in conflict with three Decisions of the Ninth Circuit and one case of the Third Circuit. This is not the case. The petitioners contend that these cases are factually the same as this case. That is wrong. The cases in some ways are factually similar, but they are in other ways very different. The major difference is that in each of the four cases cited the substantial evidence in those records as a whole supported a conclusion that the subsequent employment aggravated an earlier injury resulting in the disability suffered by the claimant's thus imposing liability on that subsequent employer. In this case the substantial evidence in the record as a whole supported a conclusion that the claimant's disability was solely the result of a natural progression of the injury that occurred while the claimant was in the employ of the first employer, Operators and Consulting Services.

The issues raised by the petitioners are more semantic than, substantive. They state that the Court below suggested that the issue for consideration is whether the claimant experienced a "traumatic event". The Fifth Circuit did not use that expression. If they had, it would not have made a difference, since a traumatic event is simply an injurious event. The Fifth Circuit as well as the Ninth, the Third and other Circuits have used the word, "trauma" in discussing the aggravation rule. This is because trauma is a

synonym of injury. (Dorland's Illustrated Medical Dictionary 25th Edition) The petitioners are also suggesting that when an employee experiences pain on the job, the courts should assume that he has experienced not only an injury, but a disabling injury. The Courts cannot make such assumptions. That is why they look closely at the evidence and especially the medical evidence. According to Dorland's pain is

> A more or less localized sensation of discomfort or distress, or agony, resulting from the stimulation of specialized nerve endings. It serves as a protective mechanism insofar as it induces the sufferer to remove or withdraw from the source.

It is a symptom. Drs. Wilson and Gramlich testified that the pain experienced by Morrison were manifestations of the harm or damage caused by the accident with OCS and were not an indication of further damage or harm.

As the Fifth Circuit pointed out the last employer rule refers to occupational disease cases as well as to non-occupational disease cases. The latter involve cumulative or aggravating traumas and these cases are referred to by the Courts as "two-injury" cases. In such cases for the second or last employer to be liable, there must be shown by the substantial evidence on the record as a whole that additional damage occurred and it was such that it resulted in disability. If it is a result of the natural progression of the original injury, the first employer is liable. This is exemplified, as pointed out by the Court, in a Fourth Circuit Decision. In that Decision the Fourth Circuit affirmed an administrative Law Judge's ruling that a flare-up of symptoms while in the employ of a subsequent employer was not a second trauma. It was according to the evidence simply an onset of complications from the first

trauma, thus the first employer was the liable employer. App. 8 (footnote) *Admiralty Coatings Corp. v. Emery,* 228 F. 3d 513, 518 (4th Cir.2000). That flare up did not aggravate the earlier injury or cause greater harm and it was not the cause of the subsequent disability.

CONCLUSION

The Courts below have recognized what the petitioners fail to acknowledge. It is that the Administrative Law Judge's finding, that the claimant's disabling back condition was due to the natural progression of his October 16, 1977 injury with OCS and that OCS was the responsible employer was reasonable in light of the evidence, was supported by substantial evidence and was in accordance with the law and consistent with the applicable legal principles. The lower appeals courts were correct in affirming the Decision of the Administrative Law Judge. Most importantly for the consideration of this Honorable Court is the fact that the applicable rule of law was applied by the Fifth Circuit in its Decision below in a manner consistent with the way in which the other Circuit Courts apply it. As such this Honorable Court Must do the same and dismiss the Writ as being without merit.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 06-250

In the Supreme Court of the United States

OPERATORS AND CONSULTING SERVICES, INC., ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports an administrative law judge's finding that an employer and its insurer are liable under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, for an employee's disability because the disability was the natural progression of a traumatic injury the employee sustained while working for the employer and was not aggravated by any injury during later work for a second employer.

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In the Supreme Court of the United States

No. 06-250

OPERATORS AND CONSULTING SERVICES, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not published in the *Federal Reporter* but is reprinted in 170 Fed. Appx. 931. The decisions of the Benefits Review Board (Pet. App. 14-22) and administrative law judge (App., *infra*, 1a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2006. A petition for rehearing was denied on May 22, 2006 (Pet. App. 31-32). The petition for a writ of certiorari was filed on August 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in covered maritime employees' disability or death. 33 U.S.C. 902(3), 903. The Act defines "injury" to mean, in relevant part, an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. 902(2). "Disability" generally "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10).

The LHWCA makes "[e]very employer" liable for paying compensation to its employees for covered employment-related disabilities or death, "irrespective of fault as a cause for the injury." 33 U.S.C. 904(a) and (b); see 33 U.S.C. 908, 909. When more than one employer may be responsible for a work-related disability, the statute does not apportion liability among the employers. In cases involving traumatic injuries at more than one employer, a second or final employer is liable for the entire disability when "an employment injury worsens or combines with a preexisting impairment [or previous injury] to produce a disability greater than that which would have resulted from the employment injury alone." *Strachan Shipping Co.* v. *Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (en banc). See, *e.g.*, *Marinette Marine Corp.* v. *OWCP*, 431 F.3d 1032, 1034 (7th Cir. 2005); *Delaware River Stevedores, Inc.* v. *Director, OWCP*, 279 F.3d 233, 241 (3d Cir. 2002). If the disability results solely from the natural progression of a prior injury, however, courts impose full liability on the employer at the time of the prior injury. See, *e.g.*, *Admiralty Coatings Corp.* v. *Emery*, 228 F.3d 513, 517 (4th Cir. 2000).

2. On October 16, 1997, respondent James Morrison injured his back while working for petitioner Operators & Consulting Services (OCS) as a field mechanic on an offshore oil platform. Pet. App. 2-3, 15; App., *infra*, 3a. Morrison received medical treatment from a chiropractor from October 1997 until February 1998. Pet. App. 3, 15; App., *infra*, 4a. After the injury, he continued to work, initially at light duty, and then at his regular duties. Pet. App. 3, 15.

In May 1998, respondent Danos & Curole Marine Contractors took over the labor contract on the platform and retained Morrison as a field mechanic after he passed a pre-employment agility test. Pet. App. 3, 15-16; App., *infra*, 5a. Later that month, Morrison returned to the chiropractor, reporting not only lower back pain but also numbness and tingling pain in his left leg, symptoms which had first appeared in March 1998. Pet. App. 3, 16; App., *infra*, 5a, 20a. The chiropractor resumed treatment, and Morrison continued to work at several physically strenuous jobs, including a total engine overhaul in which he worked 15-16 hours a day for seven days. *Id.* at 5a. Morrison reported that his back pain increased following strenuous jobs but got better following rest. Pet. App. 4; App., *infra*, 5a.

In September 1998, the chiropractor referred Morrison to a neurosurgeon. Pet. App. 4, 16; App., *infra*, 6a. Morrison's back pain continued to increase, and he stopped working in September 1998. Danos & Curole terminated his employment in October 1998. *Ibid*. Morrison's condition continued to worsen after he stopped working, even without strenuous physical labor. Pet. App. 4; App., *infra*, 6a. After several more years of treatment, diagnostic tests revealed a disc herniation and nerve root impingement. Morrison underwent lum-

bar fusion surgery in July 2001. Pet. App. 4, 16; App., *infra*, 7a, 9a-11a. Although successful, the surgery left Morrison with an 18% whole body impairment and permanently limited him to light-duty work. Pet. App. 4; App., *infra*, 11a.

3. a. Morrison filed claims for disability compensation and medical expenses pursuant to the LHWCA, 33 U.S.C. 907, 908, against both employers. OCS agreed to pay the benefits, but claimed that Danos & Curole was liable for the full amount under the aggravation rule. At a formal administrative hearing held on January 23, 2003, the parties contested primarily the issue of which employer was liable. Pet. App. 5; App., *infra*, 2a-3a; see 33 U.S.C. 919(c) and (d). The administrative law judge (ALJ) concluded that OCS was liable because Morrison's disability was a natural progression of his October 1997 injury and not the result of any aggravation of that injury while working for Danos & Curole. App., *infra*, 23a.

The ALJ acknowledged that whether Morrison's disability was a natural progression or an aggravation was primarily a medical determination. App., *infra*, 3a. The ALJ credited Morrison's description of his symptoms and the testimony of the neurosurgeon and chiropractor that the disability resulted from a natural progression of Morrison's October 1997 injury. *Id.* at 20a-23a. In particular, the ALJ found that Morrison's new symptoms of left leg tingling—which commenced in March 1998, while Morrison was still employed by OCS—indicated that the October 1997 back injury had not resolved itself by the time he was employed with Danos & Curole. *Id.* at 12a, 20a. The ALJ also noted that Morrison sought treatment in May 1998, after he started working for Danos & Curole, because of continuing pain over the

preceding months. *Id.* at 20a. Although the ALJ noted that it was not possible to place a definitive date on the origin of Morrison's disc problem, *ibid.*, the ALJ placed great weight on the neurosurgeon's statements that a back condition can deteriorate on its own, in spite of either work or rest, *id.* at 22a, and that Morrison's episodes of pain were most likely "flare-ups" not necessarily correlated with further physical damage, *id.* at 12a, 22a.

b. The Benefits Review Board (BRB or the Board) affirmed the ALJ's decision. Pet. App. 14-22. The Board concluded that the ALJ applied the correct legal standard in deciding whether employment at Danos & Curole aggravated Morrison' s October 1997 injury, and that the ALJ' s finding of no aggravation was supported by substantial evidence. *Id.* at 18-20; see 33 U.S.C. 921(b)(3).

c. The court of appeals affirmed.* Pet. App. 1-13. The court stated that "for the second or last employer to be liable" for an injury that occurred during earlier employment, "there must be evidence of additional trauma or damage that * * * occurred in the course of the second or last employment." *Id.* at 8 n.2. The court concluded that substantial evidence supported the ALJ's factual finding that Morrison's disability resulted from the natural progression of his October 1997 injury. *Id.* at 10-13. The court cited the equivocal medical testimony before the ALJ and concluded that the ALJ acted reasonably in crediting the doctors' ultimate conclusion

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* A panel of the Fifth Circuit initially denied the petition for review without hearing argument. Pet. App. 23-29. The court subsequently vacated that judgment sua sponte and scheduled the case for argument. *Id.* at 30.

that there was no aggravation during Morrison's employment with Danos & Curole. *Id.* at 13.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioners do not dispute that they would be liable for benefits if Morrison's disability resulted from the natural progression of his October 1997 injury and not from an aggravation of that injury during subsequent employment. They argue, however, that the Fifth Circuit misapplied the test for determining aggravation by suggesting that aggravation requires a "traumatic event." Pet. 5.

Petitioners misconstrue the court of appeals' statement. After setting forth the general rule that "a second or final employer * * * is liable under the aggravation rule for the entire cost of an employee's disability if the preexisting impairment was aggravated during the course of the employee's second or final employment," Pet. App. 7, the court stated that aggravation must be shown by "evidence of *additional trauma or damage* that * * * occurred in the course of the second or last employment." *Id.* at 8 n.2 (emphasis added). "Additional trauma or damage" does not necessarily mean a single additional traumatic event. The damage can occur gradually. The Fifth Circuit's rule therefore is consistent with the rule applied in other circuits. See, *e.g.*, *Marinette Marine Corp.* v. *OWCP*, 431 F.3d 1032, 1035 (7th Cir. 2005); *Delaware River Stevedores, Inc.* v. *Director, OWCP*, 279 F.3d 233, 241-242 (3d Cir. 2002).

2. a. Substantial evidence supported the ALJ's factual finding that Morrison's disability resulted from the "natural progression" of his initial injury. Pet. App. 13; see 33 U.S.C. 921(b)(3) (stating that findings of fact are "conclusive if supported by substantial evidence in the record considered as a whole"). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). As the court of appeals noted, the medical evidence before the ALJ was equivocal. Pet. App. 10-12; see App., *infra*, 12a-13a. But Morrison's neurosurgeon made several statements that supported the ALJ's conclusion: that Morrison's condition was due to a natural progression, that a change in symptoms did not necessarily indicate a change in the underlying condition or further physical damage to the area, and that Morrison's pain could get worse over time without additional damage to the disc. App., *infra*, 12a-14a; see Pet. App. 11 n.3; see also *id*. at 12 n.4 (citing testimony of chiropractor). The ALJ also considered Morrison's own testimony and that of his chiropractor, and found them all consistent with the conclusion that Morrison's injury was not aggravated by his subsequent employment. App., *infra*, 20a-23a. Although a different factfinder may have credited different evidence to reach a different conclusion, the court of appeals correctly deferred to the ALJ's reasonable determination. See *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency' s finding from being supported by substantial evidence."); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 25 n.53 (D.C. Cir. 1976) (en banc).

b. Petitioners argue (Pet. 8-14) that the court of appeals' decision cannot be reconciled with four decisions of two other courts of appeals. Differences in the application of the "substantial evidence" test are highly fact-specific and rarely warrant this Court's review. This is especially so in a case like this one, in which the ALJ was called upon to weigh competing medical evidence and render a conclusion as to medical causation.

In any event, the cases petitioner cites are factually distinguishable. In each case, the court of appeals found substantial medical evidence that the second or final employment injury physically aggravated the underlying condition. In *Metropolitan Stevedore Co.* v. *Crescent Wharf & Warehouse Co.*, 339 F.3d 1102 (9th Cir. 2003), there was evidence that the employee experienced "gradual wearing away of the bone" every day he worked. *Id.* at 1105. In *Delaware River Stevedores*, the only credible medical evidence in the record suggested two distinct "injuries." 279 F.3d at 242. In *Foundation Constructors, Inc.* v. *Director, OWCP*, 950 F.2d 621 (9th Cir. 1991), the only testifying doctor who examined the employee stated that the additional strenuous work was "harmful," *id.* at 624, and other witnesses also attributed the injury to "cumulative trauma." *Ibid.* Finally, in *Kelaita* v. *Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), there was evidence that the employee's repetitive activity inflicted "cumulative trauma" that "aggravated the underlying injury." *Id.* at 1312. In this case, there was no direct evidence that repetitive activity at Danos & Curole caused further damage to Morrison's underlying injury. See App., *infra*, 23a. In the absence of such evidence, the ALJ could reasonably conclude, based on the doctors' testimony, that no aggravation took place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

[Seal Omitted]

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CASE NO.: 2002-LHC-952
OWCP NO.: 7-150544

IN THE MATTER OF JAMES MORRISON, CLAIMANT

v.

OPERATORS AND CONSULTING SERVICES, INC.,
EMPLOYER ZURICH AMERICAN INSURANCE CO.,
CARRIER DANOS & CUROLE MARINE CONTRACTS,
INC., EMPLOYER
AND
GRAY INSURANCE COMPANY, CARRIER

April 16, 2003

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by James Morrison (Claimant) against Operators and Consulting Services, Inc. (Employer), Zurich American Insurance Co.(Carrier), Danos & Curole Marine Contracts, Inc.(Employer), and Gray Insurance Company (Carrier). The formal hearing was conducted at Metairie, Louisiana on January 23, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Operators and Consulting Services (OCS) DX 1-18 and Danos & Curole EX 1-9. This decision is based on the entire record.[2]

Basically, the only issue in this case is which of the two Employers is responsible for Claimant's medical expenses and disability compensation. The issue hinges on whether Claimant's condition is a result of a natural progression of his original injury, or an aggravation of that injury while working for the second employer. All other contested issues flow from the determination of which employer is responsible.[3] The parties have agreed

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[1] The parties were granted time post hearing to file briefs through March 14, 2003. Claimant's attorney did not file a brief.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Operators and Consulting Services's Exhibit- "DX __, pg.__"; and Danos & Curole's Exhibit- "EX __, pg.__".

[3] The other issues listed were 1) whether Claimant incurred an injury within the definition of the Act; 2) whether an employer/ employee relationship existed at the time of injury; and 3) whether the

that regardless of which Employer/Carrier is found liable the Claimant shall continue to receive compensation and medical benefits under the Act; provided, however, that if Danos & Curole is found to be responsible, then they will reimburse OCS for paid medical expenses according to the schedule provided by the District Director, regardless of the actual dollar amount paid by OCS (TR 104). Furthermore, the parties acknowledged that whether Claimant's condition was aggravated by continuing to work for Danos & Curole, or whether the condition would have naturally progressed in spite of his continued employment is primarily a medical determination (TR 96).

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant worked as a field mechanic for OCS, a labor pool which provided workers to an offshore platform owned and operated by Burlington Resources. As a field mechanic, Claimant was responsible for repairing and maintaining all the mechanical equipment of the Vermillion 4-12 platform, including refrigerators, doors, and air compressors (TR 29). Claimant was expected to carry two 35 lbs tool boxes and lift up to 75 lbs, but often had other people or machines to aid him. He was assigned 2 to 4 roustabouts who would help with anything needed. Claimant was assigned to a work schedule

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injury occurred in the scope and course of employment (TR 93). The issue of timely filing by the Claimant was not addressed by either of the briefs, and therefore, based on a discussion held at the formal hearing, I shall consider that issue to be abandoned (TR 105)

which required him to work seven days on the platform and then have seven days onshore to rest.

On October 16, 1997, Claimant was climbing a ladder to investigate a leak from the portable water tank, and while swinging his leg over a guard rail he felt an excruciating pain in his back He explained that he was amazed he was able to descend from the ladder, and when he reached the deck he fell to the ground, which is how a co-worker found him (TR 70). Claimant did not work for the remainder of the day, and that evening took Motrin and Deep Heat for the pain and reported his injury to his supervisors. Claimant continued to work throughout his seven day hitch, however, he called his wife and had her make an appointment with a chiropractor for when he returned to the shore.

Dr. Karri Gramlich, a chiropractor, first treated Claimant from the week after his accident in October 1997 until February 1998, when she explained to Claimant that there was little else she could do to improve his condition, and he could return to work. Although Dr. Gramlich knew Claimant still complained of pain (TR 83), she released him and recommended that he return to her if the pain increased. Claimant testified that although his condition continued to deteriorate, he continued to perform all of his job duties on the platform, in spite of the pain (TR 72).

In May 1998, Burlington Resources, the operator of the platform, terminated their contract with OCS, and contracted with another labor pool, Danos & Curole, to provide laborers to the platform. Danos & Curole was interested in retaining Claimant as the field mechanic on the Vermillion 4-12 platform, and went through the process of formally hiring Claimant. As part of the

hiring process, Claimant underwent a pre-employment agility test. Martin Knijn, the physical therapist who performed the evaluation, was aware of Claimant's back injury, as well as the physical requirements of his job. Claimant explained that he did not find the test to be overly demanding (TR 77), and he did not report any complaints of pain or discomfort. Claimant was found to be in good health, and fully capable of performing his work on the platform, without any restrictions. Claimant was officially hired by Danos & Curole on May 8, 1998 (DX 9, TR 59). Shortly thereafter, on May 22, 1998, Claimant returned to Dr. Gramlich explaining that beginning in March 1998 he had developed some left leg pain, and it had worsened in the interim which prompted him to return to her care (TR 83).

Claimant agreed that after he was hired by Danos & Curole, he was involved in one of the most strenuous jobs required of a field mechanic, engine overhaul. He performed the overhaul on a White Superior engine on platform 625, with the help of another mechanic (TR 63-64). Claimant explained that he worked 15-16 hours a day for seven days, replacing the cylinders, lining, and bearings. Following that particular job, Claimant said that his pain increased (TR 65); however, Claimant testified that he did not think that there was any event after which his condition worsened, but rather that his back progressively "went down" (TR 82). Claimant clarified by saying that the harder he worked physically, the more the pain increased (TR65), however, he did not complain until he felt that he was doing more damage than he should be doing (TR 81). He never missed work until September 1998, because he felt he needed to make a living, and he hoped that his back problem would resolve itself.

In September 1998, Dr. Gramlich referred Claimant to a neurosurgeon, Dr. Andrew Wilson, explaining to Claimant that she was concerned about nerve damage due to a disc problem, indicated by the increased tingling that Claimant complained of in his legs and foot (TR 91). Claimant agreed that shortly before he went to see Dr. Wilson, he experienced a loss of sensation in his right leg (TR 67). Claimant stopped working in September 1998, and was terminated from the employment of Danos & Curole on October 22, 1998.

Claimant explained that in the months immediately following his October 16, 1997, accident, he continued to have symptoms, however, during his seven days off he would relax and avoid any activity (TR 74). He also continued to "work smart" and avoid unnecessary strains, which he explained he had done after the accident, while working for both OCS and Danos & Curole. Between September 1998, when Claimant stopped working on the Vermilion platform, and October 2001 Claimant testified that his condition continued to deteriorate in spite of the fact that he avoided any strenuous activity (TR 80). Claimant underwent back surgery on July 9, 2001 at levels L4-5. The surgery was a success and Claimant reached Maximum Medical Improvement on June 6, 2002.

The job description for a field mechanic is exhibit 4 of DX 14. The physical demands of the job as described by Danos & Curole are 1)occasionally lifting 50 lbs. in parts and tools, from the floor to the shoulder; 2)frequently lifting weights 50-75 lbs involving parts and tools, a vertical distance of floor to waist; 3) constant lifting is required of 50 lbs, specifically a tool box, a vertical distance of floor to waist; and 4) Occasionally

carrying 75 lbs is required, using two hands and traveling 25 ft.

Medical Evidence

Claimant was treated by Dr. Karri Gramlich from October 23, 1997 until February 5, 1998, when she released Claimant back to work. Claimant returned to Dr. Gramlich on May 22, 1998 and continued treating with her until September 1998, when he was referred to Dr. Andrew Wilson, a neurosurgeon, who continued to treat Claimant and eventually performed surgery in July 2001. Claimant also was evaluated by Dr. Anthony Ioppolo, in an effort to determine the condition of his back and necessity for surgery. Martin Knijn is a physical therapist who performed Claimant's pre-employment agility test for Danos & Curole on May 7, 1998. Claimant back condition reached Maximum Medical Improvement according to Dr. Wilson on June 6, 2002.

Dr. Karri Gramlich is a licenced chiropractor who typically treats conditions of the back, strains and subluxations. She first saw Claimant on October 23, 1997, with no referral from another physician. Claimant told her about the work place accident and the onset of pain, which Dr. Gramlich specifically noted was not radiating pain. In her examination she found tenderness in the lumbosacral area and into his hips. She diagnosed Claimant with a lumbar disk disorder which created swelling and was due to a traumatic event, as well as muscle spasms and subluxations, in which the vertebrae were misaligned at level L4. After treatment to realign the bones, Claimant reported relief the following day.

During the time Claimant was undergoing chiropractic treatment, Dr. Gramlich explained that she relied on Claimant to determine his own limitations and

restrict[illegible] (DX 14, p. 19-20). Throughout December 1997, and January and February 1998, Claimant exhibited some soreness but no really disabling pain, and Dr. Gramlich noted that Claimant was improving and expressing no complaints. Claimant had complained on February 3, 1998 of some tingling in his right leg. On February 5, 1998, Dr. Gramlich released Claimant to return to work with no further treatment necessary. She explained that she felt Claimant's symptoms had resolved, and unless there was increased pain, that he could return to work without any further treatment by her. She explained that although Claimant still continued to experience stiffness in his lower back, there was no pain. Dr. Gramlich did not see Claimant again until May 22, 1998.

On May 22, 1998, Claimant returned to Dr. Gramlich complaining of the same type of pain, but also reported some new symptoms. He explained that there was a tingling in his left thigh, which had started in March 1998 and had gotten worse. Dr. Gramlich made every effort to treat Claimant, however, a constant mild pain persisted in spite of her efforts, and she recommended Claimant see a neurosurgeon, fearing that there might be nerve damage. In September 1998, Dr. Gramlich referred Claimant to Dr. Andrew Wilson, a neurosurgeon.

Dr. Gramlich's opined that the October 16, 1997, accident caused a disk injury which led to successive injuries. If it had not been for the October 1997 accident, she felt that Claimant would not have required surgery, however, she ultimately felt that Dr. Wilson was in a better position to make the determination. She explained that although symptoms may be relieved, the

underlying condition is not necessarily resolved (DX 14, p. 49). Dr. Gramlich never performed any diagnostic studies, and it is her professional opinion that Claimant herniated or damaged a disk in October 1997, however she was ultimately unsure (DX 14, p.52).

Dr. Andrew Wilson, a neurosurgeon, first saw Claimant on September 15, 1998, from a referral by Dr. Gramlich. His deposition is DX 12, and his records are DX 1. He obtained a history of Claimant's condition, and performed a physical exam. Dr. Wilson ordered the first in a series of diagnostic tests to evaluate the possibilities of compression versus gross instability of Claimant's discs. Claimant described to Dr. Wilson a course of waxing and waning pain. His back started hurting first, followed by leg pain, which was severe enough to prevent Claimant from sleeping. The left leg pain that onset in March 1998 did not respond to chiropractic treatment, and therefore, he was referred to Dr. Wilson.

On September 29, 1998, Claimant still complained of significant lower back pain radiating to the left lateral thigh, although his strength continued to be intact. The radiological studies had shown generalized osteoporosis in the lower thoracic and upper lumbar region with mild posterior bulging at L4-5 and L5-S1, slightly worse at L4-5. On the CT scan that followed the myelogram, there was a posterior central protrusion at L4-5 and mild generalized bulging at L5-S1 (DX1, p. 68). Dr. Wilson ordered further diagnostic tests to determine the etiology of Claimant's low back and left leg complaints, namely an MRI of the lumbar and thoracic spine.

On October 21, 1998, the MRI of the lumbar spine showed a herniated disc at L4-5 on the left, and

Claimant's symptoms were becoming compatible with an L5 radiculopathy, secondary to a L4-5 herniated disc. Dr. Wilson felt that Claimant could be a candidate for a decompression at L4-5. In November 1998, Claimant continued to receive treatment with Dr. Wilson, including epidural steroid injections, and other conservative measures.

On December 14, 1998, Dr. Wilson discussed the option of surgery as a last resort. The CT/myelogram of the lumbar spine showed a posterior central protrusion at L4-5, and mild generalized bulging at L5-S1. Dr. Wilson recommended a final CT/myelogram to determine if the L4-5 level had changed and worsened, and whether or not to include the L5-S1 level in the surgical options. The following week, on December 23, 1998, Claimant reported numbness in his right lower extremity, also in the L4-5, L5-S1 distribution. Dr. Wilson opined that here may have been either an increase in the size of the herniated disc, or an extruded fragment involving the right side. Claimant reported that his new right-sided symptoms began when he lifted a clothes basket on December 21, 1998 (DX 1, p. 60).

On January 20, 1999, Claimant reported to Dr. Wilson that he was doing worse than ever. Dr. Wilson noted that the radiological findings no longer showed a herniated disc, which appeared to simply be bulging, whereas before it had been herniated, and so he recommended further conservative measures. Dr. Wilson explained in his deposition that although radiographically it looked like the disc had improved, by Claimant's history he opined it was a continuation of the same problem. There were episodes in the continuum of

Claimant's illness when he got better, and times when he got worse (DX 12, p. 24).

On February 18, 2000, Dr. Wilson opined that the diagnostic tests revealed a progressive deterioration of findings, and because conservative treatment had not resulted in a significant relief in Claimant's pain, Dr. Wilson suggested an L4-5 fusion with decompression. Claimant returned to Dr. Wilson on January 25, 2001, complaining of continuing low back pain, but had also developed some weakness in the L4 and L5 myotomes, especially on the right side, as well as incontinence. Claimant continued to experience significant paraspinous and lumbosacral tenderness. Dr. Wilson recommended that Claimant get a second opinion on surgery.

Claimant underwent an L4-5 interbody fusion with pedicle fixation at Rapides Regional Medical facility on July 8, 2001. In the follow-up appointments, Dr. Wilson noted that Claimant was recovering well, and all diagnostic tests indicated that the fusion and accompanying hardware were in an excellent position. Claimant was very pleased with the results of his surgery (DX 1, p. 33). In October 2001, Dr. Wilson scheduled Claimant for physical therapy. On June 6, 2002, Dr. Wilson declared that Claimant was at Maximum Medical improvement, with a 18% whole body impairment due to the lumbar spine impairment, and he was further limited to only light duty work (DX1. p. 1)

In his deposition, Dr. Wilson explained that Claimant's complained of left leg tingling which began in March 1998 was due to a nerve root impingement which is usually caused by a herniated disc; however, he further explained that if there is was severe bulging and some compromised disc from degenerative changes in

the foramen, then there could have been radicular symptoms or leg pain. In other words, a bulging disc, although not actually herniated, could cause the nerve to be pinched. The fact that new symptoms appeared in March 1998, namely tingling in the left thigh, and not in the preceding months, was evidence of a continued progression of Claimant's problem. (DX 12, p. 82-83). In Dr. Wilson's opinion, Claimant condition was due to a natural progression; he had hurt himself in October 1997 and needed surgery in July 2001 (DX 12, p. 106).

Dr. Wilson was hesitant to state that from May 1998 until September 1998 continual loading of the spine caused an exacerbation, which caused Claimant to seek further medical care (DX 12, p. 98). He clarified that by saying that he viewed the pathology as a continuum, with symptoms that waxed and waned, but not the result of two injuries. However, based on the job description provided by Danos & Curole (DX 14, exhibit 4), Dr. Wilson agreed that the requirements of Claimant's job were sufficient to put a constant strain on a person's lower back. Dr. Wilson also remembered Claimant describing times when he had to wear a heavy tool belt or lift something heavy from a boat, or swing over and perform a task on the platform, and Claimant explained that it was killing his back to do "that stuff" (DX 12, p. 46). Dr. Wilson agreed that lifting heavy things with a compromised back could cause problems. However, Dr. Wilson explained that Claimant's complaints of pain were flare-ups of the condition that arose on October 16, 1997 (DX 12, p. 49). Dr. Wilson agreed that it was very possible, based on his experience as a neurosurgeon, that each flare-up experienced by Claimant between May 1998 and September 1998 would be a cumulative

trauma which aggravated claimant's back condition resulting in surgery (DX 12, p. 52).

Dr. Wilson was unable to make definitive statements as to Claimant's condition and whether surgery would have been necessary if he had stopped working after April 30, 1998. He explained that a change in symptoms does not indicate a change in the underlying condition. Simply because Claimant described further pain, does not mean that there was co-extensive further damage to the underlying condition. It might just mean there was a manifestation, not a worsening, of the problem (DX 12, p. 68).

In explaining the progression of Claimant's condition between 1998 and the surgery in 2001, Dr. Wilson said that clinically Claimant experienced chronic debilitating pain, and the entirety of Claimant's condition worsened, from the symptoms to the nerve impingement problems at L4-5. Dr. Wilson described the situation by saying that Claimant had hurt himself, and over a period of time it got much worse, finally getting to a point where he could no longer tolerate the pain. The radiographic findings showed why he was complaining of the radicular symptoms and experiencing pain. Dr. Wilson agreed that the herniation might have existed before he ever saw Claimant, but did not think Claimant herniated the disc on October 16, 1997 (DX 12, p. 72). He agreed it was possible that Claimant hurt himself after April 30, 1998, but he was not certain when the herniation occurred. [*sic*] (DX 12, p. 105, ll 14-16). There is no way to determine the chronology of the radiological findings because there were no diagnostic tests prior Claimant's work with Danos & Curole.

In relying on what Claimant told him, Dr. Wilson opined that Claimant got progressively worse over time (DX 12, p. 103), a little bit of waxing and waning in symptomology, but eventually the diagnostic tests and the symptoms fit together. Dr. Wilson opined that there was enough damage to the disc that caused him medically incalculable pain; and subsequently it got worse and worse over time.

Dr. Anthony Ioppolo is a board certified neurosurgeon who examined Claimant on behalf of OCS on three different occasions. He was retained by OCS to render a second opinion. Dr. Ioppolo first saw Claimant on November 24, 1998. After reviewing Claimant's medical history[4] and performing a physical examination, he opined that Claimant was magnifying his symptoms because the pain reported by Claimant did not correlate with the radiographic findings. He surmised that according to the CT/myelogram there was no nerve root impingement. He agreed that Claimant was capable of working at a medium duty job and had reached maximum medical improvement. Dr. Ioppolo did not think there was any need for surgery. Claimant completed a spinal program with one of Dr. Ioppolo's colleagues, Dr. Drape, from April through August 1999.

On March 9, 2000, Claimant reported to Dr. Ioppolo that his symptoms were much more severe than his last visit. He explained that there was pain down his left leg into his calf, and pain in the right leg ending at about the knee. Claimant also noted that he experienced sensory

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[4] In his medical history, Claimant reported to Dr. Ioppolo that he was required to carry two tool boxes each weighing 35 lbs, which was consistent with the job requirements of a maintenance mechanic (DX 13, p. 27).

loss in the large toe of his right foot. Dr. Ioppolo wrote in a letter following the visit in which he opined that Claimant was not an appropriate candidate for surgery because there was no evidence of a definitive disc rupture, and no obvious source of Claimant's left leg pain.

On October 29, 2001, Dr. Ioppolo noted that Claimant was three months post surgery, and Claimant felt that the pain was comparably intense post surgery as it had been before the surgery, however, he had not participated in any physical therapy or chiropractic care post surgery, nor had an MRI scan. Dr. Ioppolo felt that Claimant was not at maximum medical improvement, and would only be capable of light duty work (DX 2).

Dr. Ioppolo opined that the results of the pre-employment physical indicate that Claimant did not need surgery, due to the fact that Claimant's condition was improving. However, based on the complaints Claimant voiced during the November 1998 visit in his office, Dr. Ioppolo opined that Claimant's condition had deteriorated after the pre-employment evaluation in May 1998 (DX 13, p. 35). He further opined that if Claimant had stopped working on April 30, 1997, he would not have had to undergo surgery. (However, Dr. Ioppolo at no point believed that Claimant needed surgery, therefore, his opinion was not limited to April 30, 1997.)

Dr. Ioppolo explained that a natural progression has to be taken within the context also of what a patient is doing because conditions are synergistic, and obviously there is a high potential for an accelerated natural progression stress being placed on the lumbar spine (DX 13, p.47, ll. 8-14). Dr. Ioppolo also did not feel that there were any substantive changes in the diagnostic tests

from 1998 to 2000; although, the February 14, 2000, CT scan was described as noting degenerative changes worse at L4 but mainly on the right. Dr. Ioppolo explained that he looks at the whole situation, not strictly the diagnostic tests. Therefore, he still felt that there were no *significant* changes as far as the overall evaluation of the patient (DX 13, p. 49).

Dr. Ioppolo also stated that the onset of symptoms might not correlate with the actual inception of the problem, meaning that simply because a patient stated that there was an onset of pain this does not necessarily mean that the radiographic findings happened at the same point in time. There was a symptomatic deterioration, but nothing radiographically to corroborate Claimant's statements that he continued to feel more pain.

Martin Knijn is a physical therapist employed by Rehab Hospital of Lafayette HealthSouth, and hired by Danos & Curole to perform pre-employment evaluations in an effort to determine that each individual is physically capable of performing the requirements of their specific job. His deposition is DX 15, and his report is DX 11. Mr. Knijn explained that although Claimant mentioned his accident and back trouble, it was his impression that any problems were in the past and fairly minor (DX 15 p. 18). Claimant also signed a document at the conclusion of the session which attested that he had no ill effects or injury during the pre- placement evaluation.

The pre-employment agility test typically lasts 45-60 minutes, with each motion or tests lasting approximately 3-5 minutes. Mr. Knijn did not record any complaints of pain, which he opined meant that Claimant expressed no pain. Mr. Knijn also explained that the evaluation is

designed to test the maximum capabilities as oppose to abilities on a sustained basis. Although the test is designed for the capabilities of a maintenance mechanic, Mr. Knijn said that as to the realities of the job, and the physical effort needed he would defer to the opinion of someone who has performed work as a maintenance mechanic to answer the question of what they do for 12 hours a day. Claimant scored very well on the May 1998 test overall, performing all of the required activities and many within the 90th percentile of success. The back strength test lasted a total of 40 seconds, however, Mr. Knijn felt that it was an accurate judge of whether or not somebody had a healthy back, but not 100% accurate (DX 15, p. 61, ll 9).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP* v. *Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the

Administrative Procedures Act. *Director, OWCP* v. *Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill* v. *Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens* v. *Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell* v. *Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James* v. *Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employers stipulated in Joint Exhibit 1 that an injury/accident occurred on October 16, 1997, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured his back while climbing over the [illegible] of the portable water tank at work on October 16, 199[illegible]. The extent, duration and disabling effects of that injury, however, are in issue.

If Claimant's disability results from the natural progression of the first injury, then the claimant's employer/carrier at the time of the first injury is the responsible party. If the employment thereafter aggravates, accelerates, or combines with the earlier injury, resulting in Claimant's disability, he has sustained a new injury and the employer/carrier at that time is the party responsible for the payment of benefits thereafter. *Strachan Shipping Co.* v. *Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(en banc), *McKnight* v. *Carolina Shipping*, 32 BRBS 165, aff'd on recon. en banc, 32 BRBS 251 (1998). Section 20(a) of the Act, 33 U.S.C. §920(a), is inapplicable to a determination of the responsible party *Buchanan* v. *Int'l Transportation Services*, 31 BRBS 81 (1997).

In this instance, OCS (first employer) bears the burden of proving, without benefit of a further presumption, by a preponderance of the evidence that there was a new injury or aggravation during employment with Danos & Curole (second employer) in order to be relieved of liability as responsible parties. Danos & Curole, on the other hand, must prove that Claimant's condition is solely the result of the injury with OCS in order to escape liability. A determination as to which is liable requires the administrative law judge to weigh the evidence as a whole, and to arrive at a conclusion supported by substantial evidence, *Buchanan* v. *International Transportation Services*, 31 BRBS 81, 85 (1997).

Differentiating a natural progression from an aggravation revolves around whether the medical evidence submitted by the parties makes a clear delineation. The cause of a physical condition is a medical

question, and I must rely on the expertise of doctors to make such a determination. Because of the inability of medical experts to place a date on the radiological findings, I find it is not possible to say definitively when Claimant's underlying disk problem occurred. Instead I am left with a chronological history of symptoms, which may or may not follow the progression of the disc disease. Based on Dr. Wilson's and Dr. Gramlich's testimony, as well as Claimant's description of his symptoms, I determine that Claimant's disability is a result of his original injury on October 16, 1997.

Claimant testified that although he was released to work in February 1998 by Dr. Gramlich, he continued to experience symptoms of lower back pain. In March 1998 he began to experience tingling and numbness in his left thigh, a symptom that eventually caused him to return in May 1998 to Dr. Gramlich's care. There was no precipitating events during the weeks in May which he had worked for Danos & Curole that prompted him to return to a doctor's care, but rather because the pain had increased *over the preceding months*. Therefore, although he was not under the care of a physician in the months between February and May 1998, Claimant was by no means symptom free and in fact his pain worsened. Claimant testified that his back became progressively more painful, a deterioration that occurred *over time* (TR 65). Consequently, I do not find that Claimant's condition had resolved itself as his employment with OCS ended or that Claimant became symptomatic because of a new injury or aggravation following May 8, 1998.

Claimant explained that the pre-employment agility test, that OCS argues proved that Claimant's back had

resolved itself, was not strenuous enough to have actually prevented him from successfully completing the tasks identified. Even Martin Knijn, the physical therapist that administered the test, acknowledged that the test was designed to test capabilities, not sustained stress. Mr. Knijn also said he would defer to an individual who performed the actual job to determine whether the test was an accurate reflection of the stresses of the field mechanic position. In other words, Claimant's successful completion of the pre-employment evaluation is not evidence that he did not suffer from a back condition, but rather that he was capable of performing most of the tasks of his job for a limited amount of time. Therefore, I find that the pre-employment agility test in [*sic*] not evidence of a resolved back condition, but rather I credit Claimant's testimony that it was more akin to a light duty position than a diagnostic test of Clamant's disc condition.

OCS also relies on Claimant's statement that he was able to perform his job both before and after being hired by Danos & Curole, and that since his job was so physically demanding he must have, according to the hypothetical posed to Dr. Ioppolo, jeopardized his back. However, Claimant explained that the job description did not take into consideration the ways he "worked smart" as well as the plethora of help available on the platform. Claimant stated that the harder he worked the more his back hurt, but that during his 7 days of rest, the symptoms would abate. Also, Claimant explained that he could use various machines to perform the lifting identified by the job description, as well as utilizing the roustabouts who would carry his weighty tool boxes and help him on and off the platform. Therefore, although the job may have been physically de-

manding, it was not as demanding as the job description would appear. Claimant's continued work was not necessarily the reason his back condition worsened to the point of needing surgery. As Dr. Wilson explained, it is possible for a back condition to deteriorate on its own, in spite of either work or rest.

Claimant did not identify new symptoms that arose as a result of his work with Danos & Curole, but rather described a progressive deterioration of his health from October 16, 2997 [*sic*] and onwards, with some periods in which the pain abated and some periods when the symptoms would flare up, mainly when he worked more strenuously. Claimant testified that there was no aggravating event, and that if there was an onset of pain that occurred with a work-related activity that the pain was alleviated with rest. Claimant did not pinpoint a time in the months between May and September 1998 in which his back condition worsened, nor did his treating neurosurgeon record an particularly strenuous activity which caused his disc to further worsen.

Although Dr. Wilson considered the possibility that Claimant's job *may* have exacerbated his condition, he was not willing to make a definitive statement as to an aggravation or even cumulative trauma. Neither am I. Dr. Wilson was confident saying that it was simply a natural progression of the original injury, and Dr. Gramlich, who treated Claimant before and after his employment with Danos & Curole, felt too that Claimant's condition was the result of the original injury, and not an aggravation from Claimant's continued work following May 8, 1998.

OCS presents the possibility that with Claimant's tenuous back he must have injured it further while

performing his physically demanding job in the months following Danos & Curole's take over. However, that is not an argument that the evidence supports. Based on Dr. Wilson and Dr. Ioppolo's testimony, the nature of a back injury can be very fluid, and does not necessarily need aggravating events to progress to the point of either needing surgery or completely healing. Claimant's job with Danos & Curole, by his own testimony, was neither more or less strenuous, and therefore, he could have further strained his back during the work for OCS, as he developed left leg symptoms in March 1998, just as easily as he could have aggravated his back while working for Danos & Curole. Even after Claimant stopped working all together, he continued to have worsening symptoms which clearly were not the result of his duties as a field mechanic. In sum, I find that Claimant's injuries and resultant surgery are the consequence of his injury on October 16, 1997, and not the result of any continued employment with Danos & Curole.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Operators and Consulting Services, Inc. and its Carrier, Zurich American Insurance Co., remains wholly responsible for Claimant's injury sustained October 16, 1997, and the resulting disability compensation and medical costs which resulted therefrom;[5]

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[5] The parties have agreed that this is a dispute amongst employers and not a disagreement as to what is owed to the Claimant. Claimant's attorney was present at the formal hearing to represent his interests, and explained that Claimant's disability compensation and medical benefits he is receiving are acceptable, the issue simply being which

(2) The claim against Danos & Curole and its Carrier, Gray Insurance Co., is DENIED;

(3) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, responsible Employer/ Carrier shall have ten (10) days from receipt of the fee petition in which to file a response; and

(4) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 16th day of April, 2003, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:eam

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employer/carrier would be responsible to continue paying these benefits. (Tr. 18).